88- 1767

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE SAVE YONKERS FEDERATION, INC., *et al.*,

Petitioners,

—v.—

LEONARD B. SAND, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the District Court's housing remedy—directing that the City of Yonkers build 200 units of low-income scattered site housing, and requiring that of 4,000 later-built units on scattered sites 800 (20%) be set-aside "assisted" low- and "middle"-income housing—exceed his statutory jurisdiction because that remedy did not provide "preventive relief" as required by 42 U.S.C. § 3613?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE SAVE YONKERS FEDERATION, INC., *et al.*,

Petitioners,

—v.—

LEONARD B. SAND, United States District Judge,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners herein consist of Save Yonkers Federation, Inc., a not-for-profit corporation representing some forty civic, neighborhood and taxpayer groups in connection with housing and related issues in the City of Yonkers, and approximately one thousand named individuals who alleged below a personal stake in the outcome of a district court's implementation of its remedial order in a housing discrimination case. As will appear more fully *infra*, Petitioners brought a Petition for a Writ of Prohibition in the Second Circuit concerning the District Court's remedial order. Their Petition was not dismissed, but denied (see Appendix "A" hereto). Their timely Petition for Rehearing, with a suggestion of in banc consideration, was also denied (see Appendix "B" hereto). It is in connection with their unsuccessful Petition for a Writ of Prohibition that Petitioners seek a Writ of Certiorari from this Court to the United States Court of Appeals for the Second Circuit.

Opinion Below

There is no opinion of the District Court because the proceeding was an original one commenced in the Court of Appeals (28 U.S.C. § 1651). When the Court of Appeals denied the Petition for a Writ of Prohibition, it wrote no opinion, nor when it denied the Petition for Rehearing. (see Appendices "A" and "B" hereto).

Jurisdiction

This Court possesses jurisdiction of this Petition for a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

Statute Involved

Section 3613 of Title 42 of the U.S. Code is set forth as Appendix "C" hereto.

Statement of the Case

The United States Department of Justice brought a "pattern or practice" housing discrimination case against the City of Yonkers pursuant to 42 U.S.C. § 3613 (see Appendix "C").[1] After a lengthy bench trial the District Court (Sand, J.) found that Yonkers had intentionally placed all low-income, public housing in the City's Southwest quadrant resulting in racial housing segregation.[2] The District Court's Remedial Housing Order followed.[3] The City appealed, the Second Circuit affirmed,[4] and this Court eventually denied Certiorari.[5]

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1 The Yonkers branch of the NAACP intervened as a party plaintiff.

2 *U.S. v. Yonkers Board of Education, et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985).

3 Judge Sand's remedial housing order is reported at 635 F.Supp. 1577 (S.D.N.Y. 1986).

4 837 F.2d 1181 (2d Cir. 1987).

5 ____ U.S. ____, 108 S.Ct. 2821 (1988).

Following the Second Circuit's affirmance, bitter wrangling erupted between the Department of Justice, the NAACP, the City, the community, and the district judge over implementation of the Housing Remedy Order, prompting him to coerce the City Councilmen and the City into a "consent" decree. That coercion included ordering a "freeze" on all private housing development in the City of Yonkers.[6] Indeed, even the Second Circuit recognized in a related case[7] "that Yonkers entered into the Consent Decree . . . only after being threatened by the District Court with sanctions for contempt."[8]

The "consent" decree provided that the City would construct 200 units of low-income housing on 7 specific scattered sites outside of the Southwest quadrant of the City. The decree also provided that of the next 4,000 multi-family housing units which might be built in the City by private developers (also scattered throughout Yonkers), there would be a 20% set-aside (800 units) of "assisted" housing for low- and "middle"-income residents.[9]

Thus, the net result of the liability finding, the Housing Remedy Order, the Second Circuit's affirmance, this Court's denial of Certiorari and the "consent" decree was: 1,000 units of new low- and "middle"-income housing units were to be created and scattered throughout the City of Yonkers—except in the racially segregated southwest quadrant which, after the 1,000 new units were created, would remain exactly as it was on the day the case was started.

Soon after it became reasonably clear on which 7 scattered sites the 200 low-income units would be built, Peti-

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6 The District Court's "freeze" order is reported at 675 F.Supp 1413 (S.D.N.Y. 1987).

7 *Yonkers Racing Corp., et ano.* v. *City of Yonkers etc.*, 858 F.2d 855 (2d Cir. 1988).

8 858 F.2d at 865.

9 It was understood by all the parties to the "consent" decree that the City would have to make significant legislative and administrative changes in its tax, zoning, development, health and related laws and rules—to accommodate creation of the 1,000 housing units.

tioners began this prohibition proceeding in the Second Circuit. Because each of them alleged some direct connection to the locus of the 200 and/or 800 units, they sought to bar the district court from implementing his Remedial Housing Order. They stated their principal argument in the Court of Appeals thusly:

> Judge Sand's housing remedy—directing that the City of Yonkers build 200 units of low-income scattered site housing, and requiring that of 4,000 later-built units on scattered sites 800 (20%) be "assisted" housing—exceeded his statutory and constitutional jurisdiction because that remedy did not provide "preventive relief" as required by 42 U.S.C. § 3613.

A two-judge panel(Kearse and Cardamone, J.J.) denied the Writ without opinion, and an attempt at rehearing and for in banc consideration was rejected.

REASONS FOR GRANTING THE WRIT

The Fair Housing Act[10] is this Nations's foremost statute addressing racial discrimination in housing. Section 3613, providing for the Attorney General to bring "pattern or practice" cases, is the statute's core provision. And in that section Congress textually limited the relief that a federal court could provide to relief which is "preventive."

Yet despite Congress' express limitation of "pattern or practice" case relief to "preventive" relief, the district judge below promulgated a Housing Remedy Order requiring the creation of 1,000 scattered site units of public housing, while leaving the racially segregated Southwest quadrant exactly as he had found it. Neither he nor the Second Circuit on the direct appeal could adduce even a shred of authority to support the remedy (which was not directly challenged by the City in the Court of Appeals).

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10 42 U.S.C. § 3601 et seq.

Basically, the two page housing remedy portion of the Second Circuit's opinion is in two parts. The first, consisting of four paragraphs, begins with a "*see*" cite of three cases—*Dayton*,[11] *Milliken*[12] and *Swann*[13]—standing for the black-letter-law "remedy tailoring" principle. Then the first part cites *Paradise*[14] to establish that in fashioning a remedy the district court requires flexibility, that appellate deference is to be accorded his judgment, but that although the remedy choice is "a balancing process," it must nevertheless still be confined "within appropriate constitutional or statutory limits."[15]

Notably, not a single *housing* case is cited in the first part of the housing remedy portion of the opinion (or the second, as will be seen shortly), let alone any case involving the requirement that a city provide 1,000 units of scattered-site public housing—doubtless because Judge Sand's remedy was *sui generis*, and no other case, anywhere, has ever been asked to resolve the validity of such relief. Until now.

In other words, the sole foundation for the Second Circuit's affirmance of Judge Sand's housing remedy is three school cases and one employment case, all of which stand for the substantive proposition (with which no one can legitimately quarrel) that because of "constitutional or statutory limits" the punishment must fit the crime.

The second part of the Second Circuit's opinion on the housing remedy—entitled "I. Housing Remedies"[16]—consists of

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11 *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977).

12 *Milliken* v. *Bradley*, 418 U.S. 725 (1974).

13 *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

14 *U.S.* v. *Paradise*, _____ U.S. _____, 107 S.Ct. 1053 (1987). *Paradise* quotes *Swann*, *Louisiana* v. *U.S.*, 380 U.S. 145, 85 S.Ct. 817 (1965), and *Fullilove* v. *Klutznick*, 448 U.S. 448, 100 S.Ct. 2758 (1980) (which, in turn, quotes *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251 (1976)).

15 837 F.2d at 1236.

16 837 F.2d at 1236.

another four paragraphs. The last two—one dealing with the school board's return of one site to the city, and the other finding without merit "all of the defendants' other arguments"—are irrelevant to the question of whether Judge Sand's housing remedy was within statutory limits.

The only paragraphs in the entire opinion which address this question are the first two.

The first paragraph merely sets forth the City's arguments, and concludes that "[i]n light of the substantial latitude given a district court to fashion remedies for constitutional violations, we reject each of the parties' challenges."[17]

That leaves only the second paragraph to explain *why* Judge Sand's 200/800 unit housing remedy was "within appropriate statutory limits".[18]

Excluding the last two sentences—which deal with the deadline for site selection, and thus merely with a procedural aspect of the remedy's implementation—leaves the mere five sentence core of the Second Circuit's affirmance of Judge Sand's housing remedy:

> 1. As discussed in Part B.II.A. above, once a municipality has undertaken to construct low-income housing, it may not, consistent with the Equal Protection Clause, deliberately and with segregative intent concentrate that housing in predominately minority neighborhoods.
>
> 2. The remedy fashioned by the district court is closely tailored to the City's constitutional violations and intrudes no more than necessary on the City's prerogatives, consistent with ensuring that some remedial action will in fact occur.
>
> 3. Thus, the court built upon a consent decree, already agreed to by the City with HUD, for the construction of 200 units of family housing using federal funds; it was plainly reasonable for the district court to believe that the

17 837 F.2d at 1236.

18 837 F.2d at 1236.

order requiring the City to comply with this undertaking was necessary in light of the City's prior disregard of governmental urging that it select housing sites outside of Southwest and its historical willingness to forgo federal funding in order to preserve segregated housing patterns.

4. The number of units, 200, was hardly excessive in light of the City's agreement with HUD and the existing concentration of 6,566 units off housing, or 96.6% of all of its subsidized housing, in Southwest.

5. The requirement that the housing be built outside of Southwest Yonkers obviously was necessary in order to achieve some degree of correction of the imbalance caused by the City's unlawful concentration of all prior low-income family housing inside Southwest Yonkers.[19]

The first of these five sentences simply reiterates the district court's finding, and the Second Circuit's affirmance, of a constitutional violation by the City of Yonkers.

The fourth sentence—holding the 200 unit requirement not to be an excessive number of units—neither addresses the appropriateness of the 200 unit-building remedy itself, nor anything at all concerning the later 800 units.

That leaves sentences two, three, and five, to explain why the Second Circuit believed that Judge Sand's order—that the City of Yonkers now build 200 scattered site units of low-income public housing, and that 20% (800) units of 4,000 later-built housing be devoted to low- and "middle"-income housing—was acceptable, discretionary "balancing . . . within appropriate constitutional or statutory limits."[20] In other words, those three sentences are the only place where one can look to ascertain *why* Judge Sand's *sui generis* housing remedy was approved by the Court of Appeals.

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19 837 F.2d at 1236-1237.

20 837 F.2d at 1236.

Sentence two is wholly conclusory, offering no reason at all.

Sentence three informs us that it was "plainly reasonable" for Judge Sand to think it "necessary" for the city to comply with its deal with HUD, because the city had in the past opted not to go outside of the Southwest and to decline government funding to preserve racially segregated housing.

Sentence five, the last relevant one, states that Judge Sand's remedy "*obviously* was necessary"[21] to correct the housing imbalance.[22]

That is all there was.

It would be easy to characterize the District Court-Second Circuit interpretation of *the* relief provision of the Fair Housing Act as the most far-reaching ever made. But such characterization would be misleading because no case anywhere has ever defined what constitutes "preventive relief,"[23] let alone has this Court or any other ever evaluated a scattered site housing remedy under Section 3613 of the Fair Housing Act.[24] The fact is

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21 837 F.2d at 1237, emphasis added.

22 It should be noted that the Second Circuit's opinion made no ruling on "preventive relief" the Point raised in this Petition. That Point was not challenged in the district court and thus could not have been passed on by the Second Circuit.

23 *U.S.* v. *Long*, 537 F.2d 1151, (4th Cir. 1975) and *U.S.* v. *Orlofsky*, 538 F.Supp. 450 (S.D.N.Y. 1981) have said that "preventive relief" excludes legal relief such as damages, emphasizing in dicta that the equitable relief authorized is "designed to restrain or enjoin" Title VIII violations.

24 A computer search has revealed only 14 cases which even mention scattered site housing, and not one of them approves "preventive relief" akin to that imposed by the District Court here: *Arthur* v. *Toledo*, 782 F.2d 565 (6 Cir. 1986), *United States General, Inc.* v. *Joliet*, (N.D. Ill., Slip Opinion, No. 75 C 4002, Feb. 10, 1984), *U.S.* v. *Birmingham*, 538 F.Supp. 819 (E.D. Mich. 1982), *Business Association* v. *Landrieu* (E.D. Pa., Slip Opinion, No. 80-3725, Oct. 10, 1980), *Vann* v. *Housing Authority*, 87 F.R.D. 642 (W.D. Mo. 1980), *Banks* v. *Perk*, 341 F.Supp. 1175 (N.D. Ohio, 1972), *Blackshear Residents*

that the district court's Housing Remedy Order here was *sui generis*, at odds with countless judicial definitions of "preventive" (in other contexts),[26] and lacking in historical, textual, precedential, and logical support.

It is for these reasons that the Court should agree to review this case, and because, when all is said and done, *a core term* of an important federal statute has been interpreted in a manner which, arguably, is completely at variance with the intent of Congress. If that is what has happened here, the district court preformed a political function reserved by the Constitution to the political branches, but denied by Section 3613 to the judicial branch.

CONCLUSION

This Court should grant review because the meaning of "preventive relief" in Section 3613 of the Fair Housing Act needs to be authoritatively defined, and because review would provide an opportunity to remind lower federal courts that in our system of government political functions belong in the political branches, not in the judiciary.

New York, New York
April 20, 1988

BY: /s/ HENRY MARK HOLZER
Henry Mark Holzer
Counsel for Petitioners

Org. v. *Housing Authority*, 347 F.Supp. 1138 (W.D. Tex. 1972), *Ranjel* v. *Lansing*, 293 F.Supp. 301 (1969), *Stingley* v. *Lincoln Park*, 429 F.Supp. 1379 (E.D. Mich. 1977), *Resident Advisory Board* v. *Rizzo*, 425 F.Supp. 987 (E.D. Pa. 1976), *Skillken* v. *Toledo*, 380 F.Supp. 228 (N.D. Ohio, 1974), *Acevedo, Nassau County*, 369 F.Supp. 1384 (E.D.N.Y. 1974), *Hart* v. *Community School Board*, 383 F.Supp. 699 (E.D.N.Y. 1974), *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F.Supp. 1245 (N.D. Ohio 1973).

26 See, e.g., *Walker* v. *Equitable Life Assurance Soc. of U.S.*, 123 F.Supp. 306 (D.C. Ill. 1954), *Orme* v. *Atlas Gas and Oil Co.*, 13 N.W.2d 757 (Minn. 1944), *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (1906), *Zetrover* v. *Zetrover*, 103 So. 625 (Fla. 1925), *Ireland* v. *U.S.*, 406 A.2d 1259 (D.C. App. 1979), *Cartwright* v. *Warren*, 177 S.W. 197 (Tex. 1912).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed Jan. 6, 1989

Docket Number: 88-3064

IN RE: SAVE YONKERS FEDERATION, INC.

A petition for writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Dated: January 6, 1989

[illegible]

[illegible]

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
[illegible] CASSIDY
BY /s/ _____
Deputy Clerk

CERTIFIED: Jan. 9, 1989

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed Feb. 23, 1989

Docket No. 88-3064

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of February one thousand nine hundred and eighty-nine.

IN RE: SAVE YONKERS FEDERATION INC.

Petitioners.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioners Save Yonkers Federation, Inc.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH

Elaine B. Goldsmith
Clerk

APPENDIX C

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.